BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIE E. LYDAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,329
J. I. CASE COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent requested review of the January 21, 1997, Award by Administrative Law Judge Jon L. Frobish.

APPEARANCES

The claimant appeared by his attorney Dennis L. Phelps of Wichita, Kansas. The respondent appeared by its attorney Stephen J. Jones of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The sole issue upon which review was requested is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs of the parties, the Appeals Board finds:

The Award of the Administrative Law Judge should be modified. The Appeals Board agrees with the finding of a work disability after claimant was terminated. However, claimant is not entitled to a work disability while he was working and earning 90 percent or more of the gross average weekly wage he was earning at the time of his injury. The finding concerning the extent to which claimant's average weekly wage has been reduced postinjury should likewise be modified to reflect such wage loss did not occur until the date of claimant's termination from work. Furthermore, the Appeals Board also disagrees with the finding by the Administrative Law Judge that the testimony of Jerry Hardin, adopted by Dr. George Fluter, as to the extent to which claimant's tasks-performing ability has been reduced should not be considered. Instead of disregarding Mr. Hardin's tasks loss opinion in its entirety, his opinion will be adjusted to account for the duplication in tasks which results from claimant having worked as a welder with four different employers.

Respondent admitted claimant met with personal injury by accident each and every working day up to and including April 21, 1995, and that claimant's accidental injury arose out of and in the course of his employment. Although claimant disputes whether respondent fully accommodated claimant's restrictions, claimant was able to return to light duty work with respondent and performed that job until he was terminated. Claimant and respondent agree that claimant's permanent partial disability compensation should be limited to his percentage of functional impairment during that period when he was working.

It is the respondent's contention that even though the claimant suffered a permanent injury, he should not be allowed to recover a disability above his impairment of function because after returning to work he was terminated for cause. *See* Jesse F. Acklin v. Woodson County, Docket No. 147,322 (May 31, 1995); Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). The Foulk decision was based upon the predecessor to the current version of K.S.A. 44-510e. The current statute is the version of the work-disability definition applicable to this claim. However, the rationale of the Kansas Court of Appeals in Foulk has been applied to work-disability claims arising under the 1993 amendments. *See* John R. Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (Sept. 26, 1995). In Foulk the Kansas Court of Appeals stated:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker has refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same

> wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage." Foulk at 284.

In Acklin, the Appeals Board held that "employees terminated for misconduct or poor performance invoke similar policy considerations." The Appeals Board reasoned that an employee terminated for poor job performance unrelated to the work-related injury may reasonably be considered to have the "ability" to perform the job where the job loss resulted from matters within the employee's control. Under the facts of the Acklin case, the Appeals Board declined to apply the rationale of Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995) which held that an economic layoff may overcome the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e for workers who return to accommodated work at a comparable wage. Here again, it should be noted that although Acklin applied the version of K.S.A. 1988 Supp. 44-510e which existed prior to the legislature's 1993 amendments to the work disability definition, the rationale may also be applied to the current law.

However, the Appeals Board finds that this case is more analogous to the Appeals Board decision in Gayle W. James v. Valassis Color Graphics, Inc., Docket No. 165,727 (Dec. 28, 1994) than it is to Acklin. In James, the Appeals Board found that claimant's injury prevented him from continuing to perform the work he attempted to perform for the respondent postinjury. In so doing, the Appeals Board found that the rationale of Foulk and the presumption of no work disability would not apply.

In this case the claimant was released to return to work with restrictions by Dr. Fluter. He worked for approximately a year before being discharged for falling asleep on the job. We can say from the evidence that claimant demonstrated an ability to perform the job which respondent offered, although claimant disputes that this job was within the permanent restrictions imposed by Dr. Fluter. Furthermore, although there is some speculation in the record to the effect that claimant's falling asleep was due to factors unrelated to the medication claimant was receiving for his work-related injury, we do not view the record as establishing such. When confronted directly with the question as to whether the medications he prescribed had the known potential side effects of causing drowsiness, Dr. Fluter admitted they did. While claimant may have been negligent in not informing his physician of this side effect and requesting other medication, there is no evidence of malfeasance. Under these facts, the Appeals Board would not impute to the claimant the wage he was earning with the respondent postinjury. Accordingly, the claimant should not be precluded from receiving a work disability from the date of his termination.

The work disability definition found in K.S.A. 44-510e(a) as enacted by the 1993 legislature is as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The only evidence of tasks loss, in the opinion of a physician, was given by Dr. Fluter. He was presented with reports by vocational experts Jerry Hardin and Karen Terrill describing claimant's job duties and which also give their opinions concerning the extent to which claimant has lost the ability to perform the work tasks described utilizing the restrictions recommended by Dr. Fluter.

Mr. Hardin identified five jobs claimant had performed during the fifteen years preceding the date of accident. The total number of work tasks itemized was 35. Of those 35 tasks several were repeated in more than one job. After eliminating this duplication of tasks, the following 20 tasks remain:

- •Welded parts together
- •Picked up parts
- •Turned over heavy jigs
- •Ran air grinders by hand
- •Ran grinders
- •Loaded crates
- •Loaded jigs
- •Drove forklift
- •Used torch cutter
- •Cleaned up work area
- •Operated shear machine
- •Used plasma torch
- •Drilled holes
- •Shaped metal
- •Mopped floors
- •Waxed floors
- •Stripped floors
- •Dusted
- •Cleaned vents
- •Emptied trash

The job tasks described by Mr. Hardin as “ran air grinders by hand” and “ran grinders” appear to be redundant. However, Mr. Hardin shows claimant retains the ability to perform the former task but not the latter. Therefore, both are included in the above revised list of tasks. Claimant was shown to have lost the ability to perform 13 of 20 job tasks for a 65 percent loss, as opposed to the 62 percent loss Mr. Hardin arrived at by averaging the separate percentages of tasks loss for each job. Ms. Terrill identified the same five jobs as did Mr. Hardin. She determined claimant suffered a loss of tasks performing ability of 23 percent. This percentage was derived by dividing the six tasks claimant was determined to no longer be able to perform by the total number of tasks which she determined was 26.

The Workers Compensation Act does not define "work tasks" or otherwise provide any guidance as to how to determine what tasks should be identified for any given job. That there can be a difference of opinion in this regard even among vocational experts is apparent from the record in this case. The list of work tasks for the five jobs claimant worked during the relevant fifteen-year work history is different as between Karen Terrill and Jerry Hardin. We did not find in the record any compelling reason to adopt the list of tasks identified by one vocational expert over the other. Therefore, the Appeals Board considers the better approach to be to consider the tasks lists of both experts. Ms. Terrill, in her report, eliminated the redundant work tasks where claimant performed essentially the same task on more than one job before giving her opinion on percentage claimant lost. Mr. Hardin did not do this. Because the work disability statute K.S.A. 44-510e(a) speaks in terms of work tasks and not jobs, the Appeals Board concluded that tasks which are repeated in more than one job should be eliminated from the equation when determining the percentage of loss. Therefore, when we eliminated the duplication from the tasks listed in Mr. Hardin's report, which is Exhibit No. 3 to his deposition, the above-listed tasks were left.

Although the conclusions of Mr. Hardin and Ms. Terrill were different, Dr. Fluter agreed with both. There may be better methods of obtaining a physician's tasks-loss opinion testimony. Nevertheless, the Appeals Board finds that this evidence does meet the requirements of the statute. Accordingly, the Appeals Board finds the claimant's loss of tasks-performing ability should be an average of Mr. Hardin's 65 percent and Ms. Terrill's 23 percent, or 44 percent.

The second prong of this two-part test concerns the difference between the claimant's average weekly wage and the claimant's actual postaccident earnings. This prong of the two-part test is complicated by the fact that claimant's earnings changed during the period of time from the date of the accident until the submission of this claim. After his release to light duty until June 3, 1996, claimant had returned to work. During that period he had no wage loss and, consequently, no work disability. Since then claimant has been unemployed. Thus, during this time claimant has a 100 percent wage loss. When averaged with his 44 percent task loss, his work disability is 72 percent.

For the period of time claimant has been unemployed following his termination by respondent, the Appeals Board agrees that claimant has sustained his burden of proof and is entitled to a permanent partial disability award based upon a work disability in excess of his functional impairment. Prior to his termination, claimant is limited to disability compensation based upon the stipulated 8 percent functional impairment rating. The other findings of fact and conclusions of law as enumerated in the Award by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein to the extent they are not inconsistent with the specific findings and conclusions of the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated January 21, 1997, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Willie E. Lyday, and against the respondent, J. I. Case Company, a qualified self-insured, for an accidental injury which occurred April 21, 1995, and based upon an average weekly wage of $630.44 for 6.58 weeks of temporary total disability compensation at the rate of $319 per week or $2,099.02, followed by 33.2 weeks of permanent partial disability compensation at the rate of $319 per week or $10,590.80 for an 8% permanent functional impairment, followed by 265.6 weeks at the rate of $319 for a 72% work disability or $84,726.40, making a total award of $97,416.22.

As of May 5, 1997, there is due and owing claimant 6.58 weeks of temporary total disability compensation at the rate of $319 per week or $2,099.02, followed by 33.2 weeks of permanent partial disability compensation based upon functional impairment at the rate of $319 per week or $10,590.80; thereafter, commencing June 4, 1996, 48 weeks of permanent partial general disability compensation at the rate of $319 per week in the sum of $15,312, making a total due and owing of $28,001.82 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $69,414.40 is to be paid for 217.6 weeks at the rate of $319 per week, until fully paid or further order of the Director.

FURTHER, AWARD IS MADE that the claimant is entitled to medical expenses and any unauthorized medical expenses incurred up to the statutory maximum of $500 upon proper presentation of itemized statements.

Future medical will be considered upon proper application to and approval by the Director of Workers Compensation.

Pursuant to K.S.A. 44-536, claimant's fee contract with his attorney is approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

Deposition Services	
Preliminary Hearing	$ 37.50
Barber & Associates	
Transcript of Regular Hearing	$227.20

Ireland Court Reporting, Inc.

Appearance fee	$ 37.50
Deposition of Jerry D. Hardin	$199.00
Deposition of George Fluter, M.D.	$257.51

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Stephen J. Jones, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director